Supreme Court, U. S.
FILED
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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 197____

No. 76-107

CARL C. SMITH,
Appellant,

VERSUS

LINDA SMITH,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OKLAHOMA

JURISDICTIONAL STATEMENT

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July, 1976

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In the
Supreme Court of the United States

OCTOBER TERM, 197.....

No. .....

CARL C. SMITH,
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LINDA SMITH,
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ON APPEAL FROM THE SUPREME COURT OF OKLAHOMA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The Memorandum Decision of the Supreme Court of Oklahoma is not reported, but does appear herein as Appendix A. No other written opinions have been delivered.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(I) This is a civil proceeding. The parties hereto were involved in a divorce action in the District Court of Atoka County, State of Oklahoma. The Appellant in this case was awarded the custody of his minor seven year old daughter and other relief. On appeal the Supreme Court of

Oklahoma reversed the judgment awarding custody of the minor child to the father, Appellant herein, because of a statutory preference which entitles the mother to have custody of minor children of tender years. 30 Okla. Stat. Section 11.

(II) The judgment sought to be reviewed is the ruling of the Supreme Court of Oklahoma that applied the statutory preference to mothers being the proper custodian of minor children of tender years. The written opinion was entered on March 9, 1976. Timely Petition for Rehearing was filed in the Supreme Court of Oklahoma attacking the Constitutionality of Title 30 Okl. Stat. Section 11. Proposition II in the brief in support of Petition for Rehearing was, "The Supreme Court (of Oklahoma) in reversing the decision of the Trial Court has denied Appellee (Appellant herein) equal protection of the law and discriminated against Appellee by reason of sex." 'The law granting children to mothers should be ruled unconstitutional." "The Supreme Court should not substitute their judgment for the judgment of the Trial Court as to what is the best interests of the minor child." After this question was duly submitted to the Oklahoma Supreme Court, the Oklahoma Court of April 27, 1976, denied the Petition for Rehearing without opinion. By order of the Supreme Court on May 17, 1976, the Mandate was stayed until Appeal to this Court, or August 15, 1976. The Notice of Appeal was filed July 21, 1976, in the Supreme Court of Oklahoma, the Court possessed of the record.

(III) Jurisdiction of the appeal is conferred on this Court by Title 28 of the United States Code, Section 1257(2).

(IV) Cases sustaining the jurisdiction of this Court are:

—*Reed* v. *Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225;

Stanley v. *Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 2d 551 (1972);

Stanton v. *Stanton*, 95 S.Ct. 1373 (1975);

Taylor v. *Louisiana*, 95 S.Ct. 692 (1975).

(V) The validity and constitutionality of Title 30 Okl. Stat. Section 11 is here involved. The full test of that section is as follows:

30 O.S. 11. Rules for appointment

"In awarding the custody of a minor, or in appointing a general guardian, the court or judge is to be guided by the following considerations:

"1. By what appears to be for the best interests of the child in respect to its temporal and its mental and moral welfare; and if the child be of sufficient age to form an intelligent preference, the court or judge may consider that preference in determining the question.

"2. As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right, but, other things being equal, if the child be of tender years, it should be given to the mother; if it be of an age to require education and preparation for labor or business, then to the father."

In the instant case, the Supreme Court of Oklahoma in their decision reversing the trial court stated on page 3 of their Opinion:

"We conclude this case is a proper one for the application of statutory preference of mother [as it per-

tains to children of tender years] and a rule which requires it to clearly appear (Page 4) she is an improper person, before being deprived of preference."

This unconstitutional statutory preference has clearly deprived the Appellant herein of his constitutional right to equal application of the law and due process. The trial court upon a trial on the merits found that in the best interests of the child, the Appellant father should have custody, the Supreme Court of Oklahoma used a preference to reverse, a preference the Appellee mother was entitled only by virtue of her sex.

QUESTIONS PRESENTED BY THE APPEAL

The following question is presented by this Appeal:

Does a state statute that embodies a sexual preference in custody matters violate the Fourteenth Amendment. The question can be paraphrased in the language of the United States Supreme Court in *Stanley* v. *Illinois*, 92 S.Ct. 1208, 1215, and thus stated that though procedure by presumption is always cheaper and easier than individualized determination, where it forecloses the determinative issues of competence and care, when it as in the instant case explicitly disdains present realities in deference to past formalities or theories, the statute and procedure needlessly risks running rough shod over the important interests of both parent and child, and therefore cannot stand.

STATEMENT OF THE FACTS OF THE CASE

Carl C. Smith, Appellant herein, is a citizen of the United States, and a resident of Atoka County, State of Oklahoma. The Appellant was married in 1967 in Oklahoma to the Appellee, Linda Smith. They lived in Atoka County and had one child, a daughter, Carla Louise Smith. The Appellee filed a divorce action in Atoka County and the Appellant defended the same. There was conflicting evidence concerning adultery of the Appellee and mental cruelty of the Appellant. After the trial on the merits with both sides putting on evidence regarding their respective positions, the trial court entered its judgment and decree (See Appendix B). The judgment among other things granted the custody of the minor child to the Appellant.

Thereafter, the Appellee herein, Linda Smith, appealed the decision to the Supreme Court of Oklahoma. The Supreme Court, after reviewing the record on appeal, invoked a statute of the State of Oklahoma, 30 O.S. 11. The Supreme Court stated on March 9, 1976, that this case was a proper ...istance for the Supreme Court to exercise the statutory preference of mothers over fathers in awarding custody of minor children of tender years. The Appellant herein urged the unconstitutionality of this statute in his Petition for Rehearing. The rehearing was denied without opinion on April 27, 1976. The Supreme Court of Oklahoma on March 9, 1976, reversed the custody award to the Appellant-Father solely on the statutory sexual preference. The trial judge on the other hand after hearing witnesses and viewing their demeanor resolved the question of custody in

favor of the Appellant-Father. The Appellant contends that this unconstitutional statute denied the Appellant equal application of the law and due process.

Thereafter, the Supreme Court of Oklahoma on May 17, 1976, stayed the enforcement of the Mandate in this case until August 15, 1976, or until this Court finally disposed of this appeal. A cost bond in the amount of $500.00 was filed on May 20, 1976, staying the enforcement of this Mandate. The Mother-Appellee has subsequently, in contempt of the trial court and Supreme Court, taken the child and disappeared from sight.

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

The *Fourteenth Amendment to the United States Constitution, Section (11)* provides the following:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No state shall make or enforce any law which shall abridge the privilege or immunities of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

(i) The importance of the family and the integrity thereof has found protection in the Fourteenth Amendment.

The private interest here, that of a man in the children he has sired and raised, undeniably warrants protection of the Constitution. *Stanley* v. *Illinois*, 92 S.Ct. 1208 (1972).

The Supreme Court of the United States has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed essential. *Stanley* v. *Illinois, supra; Meyer* v. *Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042; *Skinner* v. *Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655. The United States Supreme Court has stated that raising one's children are rights far more precious than property rights. *May* v. *Anderson*, 345 U.S. 528, 73 S.Ct. 840, 97 L.Ed. 1221. The Supreme Court has found that the Constitution protects the family unit. *Skinner* v. *Oklahoma, supra, Griswold* v. *Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed. 2d 510.

(ii) A presumption or classification based solely on sex is inherently suspect that the same is unconstitutional.

The Statutes of the State of Oklahoma in the instant case provides that:

> "As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right, but, other things being equal, if the child be of tender years, it should be given to the mother; if it be of an age to require education and preparation for labor or business, then to the father." 30 O.S. 11.

The Legislature of the State of Oklahoma, further, by statute has stated that decisions regarding separated parents and custody of children should be guided by 30 O.S. 11. Title 10, Okl. Stat. 21. The Oklahoma Supreme Court has made this statute a mandatory preference upon the trial judge. *Logan* v. *Logan*, 197 Okl. 88, 168 P.2d 878 (1946). The trial judge must give custody of the child of tender

years to the mother if the mother be a fit and proper person. *Blackwood* v. *Blackwood*, 204 Okl. 317, 229 P.2d 602 (1951). This statute is a preference based on sex.

It is unconstitutional to give a mandatory preference to members of either sex over members of the other, and to do so is to legislate the very kind of arbitrary law forbidden by the Equal Protection Clause of the Fourteenth Amendment. *Reed* v. *Reed*, 92 S.Ct. 251 (1971). Classifications based solely on sex may be unconstitutional. *Stanton* v. *Stanton*, 95 S.Ct. 1373 (1975). *Taylor* v. *Louisiana*, 95 S.Ct. 692 (1975). In the *Reed* case, a preference to a male over a female for appointment as an administrator was ruled unconstitutional. In the *Stanton* case provisions of the law stating that child support should be paid to male children longer than female children were ruled unconstitutional. The *Taylor* case held that women should not be excluded from jury service solely because they have minor children and to do so is a sexual preference which is constitutionally unfair. Classifications based on sex are inherently suspect. *Weinberger* v. *Wisenfield*, 95 S.Ct. 1225, *Schlesinger* v. *Ballard*, 95 S.Ct. 572, *Kahn* v. *Shevin*, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974).

(iii) There is no rational basis for the arbitrary sexual preference, and therefore Title 30 O.S. 11 is unconstitutional, and the instant case should be reversed and remanded to the Oklahoma Supreme Court.

The statute in question does not give any reason for this sexual preference. The only possible reason could be that the mother is more prone to stay at home and raise the children. The issue of infant feeding is not raised

herein, but very few mothers breast feed their children. No longer is the female destined solely for the home and the rearing of the family, and only the male for the market place and the world of ideas. Women's activities and responsibilities are increasing and expanding. *Stanton* v. *Stanton*, 95 S.Ct. 1373 (1975).

At one time the United States Supreme Court assumed that woman is still regarded as the center of family life. *Hoyt* v. *Florida*, 368 U.S. 57, 62, 82 S.Ct. 159, 162. In the *Taylor* v. *Louisiana* case, *supra*, this position was reversed and changed. The Court therein stated, "It is untenable to suggest these days . . . that society cannot spare any women from their present duties". *Taylor* v. *Louisiana*, *supra*, at 700. Women are no longer staying at home to raise families. In statistics cited in Footnote 17 in *Taylor* v. *Louisiana*, *supra*, the Department of Labor indicated that in October 1974, 54.2% of all women between 18 and 64 years of age were in the labor force. United States Dept. of Labor, Women in the Labor Force (Oct. 1974). Additionally, in March 1974, 45.7% of women with children under the age of 18 were in the labor force; with respect to families containing children between the ages of six and 17, 67.3% of mothers who were widowed, divorced or separated were in the work force, while 51.2% of the mothers whose husbands were present in the household were in the work force. Even in family units in which the husband was present and which contained a child under three years old, 31% of the mothers were in the work force. United States Dept. of Labor, Marital and Family Characteristics of the Labor Force, Table F (March 1974).

Families consist of both working mothers and fathers. There is no rational reason in modern society why a father cannot raise a child of tender years as well as a mother. A father should have the right to prove his fitness as a parent. *Stanley* v. *Illinois, supra.* In the instant case this is what happened, until the Oklahoma Supreme Court reversed that determination because of a statutory sexual preference. The trial court determined that the Appellant-Father was a better person to raise his child than the Appellee-Mother. The Supreme Court said that the legislation by statute has taken that decision from the trial court. This statutory preference may be easier on courts, but it has no rational basis. The woman is not the center of the family. Each case should be decided on the evidence presented according to due process concepts, rather than a preference based on sex. The statute makes it mandatory to condemn the woman before custody may go to the man, not to allow justice to determine the best home as due process requires. *Stanley* v. *Illinois, supra.*

CONCLUSION

This appeal raises a fundamental issue of paramount importance to the question of domestic tranquility and the welfare of children. The right to raise one's children is a higher right than property. The Constitution of the United States will not allow this statutory sexual preference to dictate to Courts the rule rather than have justice and the orderly trial process decide the important and fundamental question of child custody. In this day of the deterioration and disintegration of the family unit, no

greater question plagues courts than who should raise the children. Statutory presumptions should not run rough shod over important interests of parent and child and ignore present day realities. The father is capable of caring for his child. This case should be reversed and remanded, and Title 30 Oklahoma Statutes, Section 11, should be declared unconstitutional.

Respectfully submitted,

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Attorneys for Appellant

July, 1976

APPENDIX A

NOT FOR PUBLICATION IN
OFFICIAL REPORTER

FILED
SUPREME COURT
STATE OF OKLAHOMA
MAR 9 1976
ROSS N. LILLARD, JR., Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Linda Smith,	)	
Appellant,	)	
vs.	)	No. 48,058
Carl C. Smith,	)	
Appellee.	)	

APPEAL FROM DISTRICT COURT OF
ATOKA COUNTY, OKLAHOMA

Hon. Lavern Fishel, Trial Judge

Trial court granted divorce to defendant, custody of minor child and made division of property. Plaintiff appeals.

REVERSED

G. Wendell Cathey,
Durant, Oklahoma, For Appellant.

Bill Moore,
Atoka, Oklahoma, For Appellee.

BERRY, J:

This appeal concerns propriety of trial court's decree granting husband divorce, custody of minor child and making division of property.

Plaintiff [wife] sought divorce and custody of 7 year old female child on ground of extreme cruelty. Defendant denied misconduct and cross-petitioned for divorce and custody of child on ground of gross neglect of duty.

Trial court awarded defendant divorce on ground of adultery and awarded defendant custody of child.

Trial court made division of parties' separate property. As to jointly acquired property it granted plaintiff $18,-000.00 alimony in lieu of division of property to be paid at rate of $100.00 per month.

Parties were married in 1967. They lived together as husband and wife until this divorce action was filed in 1974. They purchased 360 acre ranch in 1970 and raised livestock. Of the marriage one child was born, a daughter, who was 7 years old at time of trial.

Defendant, his mother and sister, all testified plaintiff had temper tantrums; overdisciplined child; and home was not well kept.

Defendant's mother testified she had been crippled in auto accident but with aid of walker could keep house and care for child. She further testified child was happy, pleasant and healthy.

Plaintiff testified child was happy and well adjusted. She denied overdisciplining child. She admitted being under doctor's care for nerves, but said defendant would not allow her to keep nerve pills. She stated her nerves were much improved since separation from defendant and child had gained ten pounds. She further testified she attempted to keep house but after milking and feeding cows twice daily, cooking and doing laundry she was sometimes "just pooped." She said defendant would not buy her vacuum cleaner because it was too expensive but had paid $100 to help his mother buy one.

A neighbor testified plaintiff had good reputation; her home was clean; and child appeared healthy and happy.

Plaintiff asserts there was no testimony from unbiased witnesses to show her to be an unfit mother. She cites 30 O.S. 1971 § 11, which is a statutory preference of mother for child of tender years:

> "* * * other things being equal, if the child be of tender years, it should be given to the mother * * *"

In Hurt v. Hurt, Okl., 315 P.2d 957, which involved custody of eight year old boy, we said:

> "It is generally recognized that the mother is a natural custodian of her child of tender years, and that if she is a fit and proper person other things being equal, she should be given custody in order that the child may receive the attention, care, supervision, and kindly advice, which arises from a mother's love and devotion, *for which no substitute has ever been found.* [Emphasis added]"

In Irwin v. Irwin, Okl., 416 P.2d 853, we quoted from Bruce v. Bruce, 141 Okl. 160, 285 P. 30, the following statement:

> "* * * Courts know that mother love is a dominant trait in the heart of a mother, even in the weakest of women. It is of divine origin, and in nearly all cases far exceeds and surpasses the parental affection of the father. Every just man recognizes the fact that minor children need the constant bestowal of the mother's care and love. It is for these reasons courts are loath to deprive the mother of the care and custody of her children, and will not do so, as above remarked, *unless it clearly appears that she is an improper person to be intrusted with their care and custody.* [Emphasis added]"

Testimony of defendant's mother and sister lacks clarity and decisiveness necessary to be convincing. It

reveals, at its best, ill-feeling and long lived controversy between plaintiff and her in-laws. Neither testified specifically plaintiff was unfit mother. Such opinions expressed by prejudiced witnesses have little or no probative value.

We said in Currin v. Chadwick, 206 Okl. 148, 241 P.2d 947:

> "The unfitness which will deprive a mother of the right to the custody of her minor child must be a positive and not merely a comparative unfitness * * *
>
> 'It is not sufficient to establish the unfitness of a parent for the custody and control of her minor child to show that she has some faults of character, or bad habits; it must be shown that her condition in life, or her character and habits are such that provision for the child's ordinary comfort and contentment, or for its intellectual and moral development, cannot be reasonably expected at the parent's hand."

The best interest of child is primary consideration in determination of custody of minor child in divorce action. Frankovich v. Frankovich, Okl., 459 P.2d 583.

We conclude this case is proper one for application of statutory preference of mother [as it pertains to children of tender years] and of rule which requires it to *clearly appear* she is "an improper person", before being deprived of preference. As evidence falls short of that degree of proof, trial court's decree as to custody of child is clearly against weight of the evidence and is reversed, subject to reasonable visitation rights of defendant.

Plaintiff next contends trial court erred in granting divorce to defendant on ground of adultery.

Defendant sought to prove misconduct on part of plaintiff occurring in 1969. He introduced into evidence letter he received in 1969 wherein writer left an inference

of having been intimate with plaintiff. The writer, an old friend of defendant, had written to apologize.

Plaintiff's counsel objected to letter being introduced on grounds of remoteness and defendant has shown forgiveness since then. Objection was overruled.

The only other evidence offered to support charge of misconduct was based on defendant's suspicions.

Condonation is established if husband after discovering misconduct on part of wife, resumes marital relations with her. Where there is no misconduct occurring after resumption of such relations, he will be precluded from offering evidence of prior misconduct. Fowler v. Fowler, 119 Okl. 95, 248 P. 629; Edgell v. Edgell, 120 Okl. 281, 251 P. 43.

We conclude if plaintiff had been guilty of misconduct in 1969, defendant condoned offense by resuming marital relations with her. Further, we conclude evidence is not convincing any misconduct has occurred subsequent to 1969. See Evans v. Evans, 123 Okl. 9, 252 P. 837; Hartshorn v. Hartshorn, 67 Okl. 45, 168 P. 822. We have examined record and conclude evidence also fails to prove gross neglect of duty.

Trial court's judgment granting defendant divorce by reason of adultery is reversed.

Plaintiff's petition asked divorce upon ground of extreme cruelty. There was evidence in support of matters alleged bearing upon defendant's course of conduct toward plaintiff.

Plaintiff testified she was seldom allowed use of a car; not allowed to visit her family; not allowed telephone; not allowed her nerve pills; not allowed to write checks; and not allowed vacuum cleaner. She further testified defendant physically abused her.

There was corrobative evidence plaintiff was physically abused. Defendant admitted to having slapped and bruised plaintiff.

We conclude evidence was sufficient to support decree of divorce upon ground of extreme cruelty. 12 O.S. 1971 § 1271; Lavender v. Lavender, Okl., 435 P.2d 583.

Since trial court failed to make finding upon plaintiff's petition, we render judgment that should have been made. Divorce is therefore granted to plaintiff.

Plaintiff questions trial court's award of alimony in lieu of division of property.

Trial court fixed value of jointly acquired real property at $72,000.00. It fixed value of jointly acquired cattle at $18,875.00. Indebtedness on real property, cattle and various small bills was set at $47,275.00. Net value of jointly acquired property after debts was then set at $43,600.00.

Trial court awarded plaintiff alimony in sum of $18,000.00 in lieu of division of property. This sum to be paid at rate of $100.00 per month and to be lien on real property.

Plaintiff contends trial court failed to make proper division of property because alimony will terminate under 12 O.S. 1971 § 2389(b), on death or remarriage of recipient.

This question has been decided in recent case of Shea v. Shea, Okl., 537 P.2d 417, wherein we cited with approval Diment v. Diment, Okla.Ct.App., 531 P.2d 1071, which said:

> "As we interpret the above statute, in any divorce decree 'which provides for periodic alimony payments,' the court 'may designate all or a portion of each such payment as support,' but if the trial court does not so designate, then such periodic payments shall continue in full until the entire amount awarded is paid regardless of the death or remarriage of the recipient."

In instant case neither all nor any part of periodic alimony payments was designated as support.

We conclude trial court did not err in awarding plaintiff periodic alimony payments.

We do not disturb trial court's award to plaintiff alimony in the sum of $18,000.00 in lieu of division of property. This sum to be paid at rate of $100.00 per month and to be a lien on real property.

We conclude, in view of our findings herein, that the award to plaintiff is inadequate. We hold plaintiff shall be paid an additional $10,000.00 as alimony for support at the rate of $100.00 per month. This shall continue until paid or until her death or remarriage.

The remaining question concerns support of minor child. Defendant is directed to pay $100.00 monthly so long as child remains unemancipated, or further order of trial court.

We have examined record and weighed evidence and find trial court's judgment is against the weight of evidence.

Cause is remanded with directions to render judgment in accord with views herein expressed.

IRWIN, BARNES, SIMMS and DOOLIN, JJ., concur.

WILLIAMS, C.J., HODGES, V.C.J., DAVISON and LAVENDER, JJ., concur in part; dissent in part.

APPENDIX B

CERTIFICATE OF TRUE COPY

I, Joy Surrell, Court Clerk for Atoka County, Oklahoma, hereby certify that the foregoing is a true, correct and complete copy of the instrument herewith set out as appears of record in the Court Clerk's office of Atoka County, Oklahoma, this 22 day of March, 1976.

JOY SURRELL
Court Clerk
By (s) *Joy Surrell*

IN THE DISTRICT COURT OF ATOKA COUNTY
STATE OF OKLAHOMA

Linda Smith,	Plaintiff
vs.	No. D-74-41
Carl C. Smith,	Defendant

JOURNAL ENTRY

On this 8th day of October, 1974, the above entitled cause comes on for trial on its merits. Plaintiff appears in person and by her Attorney, Jerry Otis, and the defendant appears in person and by his Attorney, Bill Moore. Both parties announcing ready for trial and the Court ordering that the trial be proceeded with and it proceeded. The Court having heard the evidence of witnesses sworn and examined in open Court and having examined the files and having heard the oral testimony of witnesses sworn and examined in open Court and taking such matter under advisement. And now the Court having considered the evidence of the witnesses sworn and having examined the files and records in the case and having fully considered the evidence finds as follows:

(1) That defendant should be granted a divorce on the grounds of adultery.

(2) That the defendant should be granted custody of the minor child with reasonable visitation privileges afforded the Plaintiff at the defendant's convenience.

(3) That during coverture, defendant and Plaintiff have acquired real estate of approximate value of $72,000.00; cattle of the approximate value of $18,875.00; and certain household furniture. (no value established at time of trial of the furniture.)

(4) That Plaintiff and defendant owe approximately on the real estate, cattle and various small bills (some secured—others not), the sum of $47,275.00.

(5) That Plaintiff and defendant have a probable net value, after debts, of $43,600.00 and that alimony should be decreed to Plaintiff in lieu of a division of property.

(6) That an equitable division of property (real and personal) should be decreed by the Court.

(7) That the 1971 Ford Pickup should be decreed to be the property of the defendant.

(8) That the Buick Wildcat should be decreed to be the separate property of the Plaintiff.

(9) That certain household items, personal property, and personal items, should be decreed the separate property of the Plaintiff.

(10) That Plaintiff should be decreed an Attorney fee for the services of her Attorney, to be paid by defendant.

It is therefore ordered, adjudged and decreed by the Court that the defendant, Carl C. Smith, be and he is hereby awarded an absolute Decree of Divorce from Plaintiff, Linda Smith, and the bonds of matrimony heretofore existing between said parties are hereby dissolved, set

aside, and held for naught, and both parties are released therefrom; provided, that this part of the Decree does not become absolute and final until six months from the date hereof, during which time the parties are enjoined from marrying any other party.

It is further ordered, adjudged and decreed by the Court that the defendant be and he is hereby granted the exclusive care and custody of the minor child, Carla Louise Smith, that Plaintiff is granted rights of visitation with said child at reasonable times, and under reasonable conditions, and further specific visitation privileges as follows:

(a) Thanksgiving Holiday to be alternated each year between Plaintiff and defendant. Said minor child to spend the 1974 Thanksgiving Holiday with Plaintiff beginning at 5:00 p.m. on the Wednesday preceding Thanksgiving until 5:00 p.m. on the Sunday following Thanksgiving.

(b) Christmas Holiday to be alternated each year between Plaintiff and defendant. Said minor child to spend the 1974 Christmas Holiday with Plaintiff beginning at 5:00 p.m. on the Sunday preceding Christmas until 5:00 p.m. on the Sunday following Christmas.

(c) Plaintiff to have custody of said minor child for two weeks each summer beginning the first week of July each year.

(d) The Plaintiff to be responsible for picking up said minor child for said visitation privileges and returning said child at the conclusion of said visitation privileges to defendant.

It is further ordered, adjudged and decreed by the Court that all real estate, cattle and other items of personal property unless not specifically decreed to be the separate property of Plaintiff, decreed to be the specific property of the defendant, and defendant is obligated for all outstanding indebtedness.

It is further ordered, adjudged and decreed by the Court that alimony awarded and decreed Plaintiff in lieu of division of property, and not specifically decreed herein, the sum of $18,000.00; same to be paid by defendant at the rate of $100.00 per month until paid in full; or, in the alternative, defendant has the option of paying the amount in the excess of $100.00 per month, if desired. The award of alimony is in lieu of division of the property specifically decreed to be the property of the defendant such payment in lieu of a division of property shall continue until terminated; and said award of alimony to be considered to be a lien upon the property of real estate of defendant and appurtenances thereon affixed until paid. Said payments of alimony to become effective on December 1, 1974 and paid to the Clerk of the Court of Atoka County, Oklahoma.

It is further ordered, adjudged and decreed by the Court that 1971 Ford Pickup is decreed to be the separate property of the defendant and the Buick Wildcat to be the separate property of the Plaintiff.

It is further ordered, adjudged and decreed by the Court that one Black Quarter Horse (gelding); One saddle, pad and bridle; One Maytag Washer; One Signature Icebox; One Detroit Jewel cookstove; One Naughahyde Hideaway Couch; One-half of dishes and cookware; all miscellaneous personal items; One-half of all linens; One Cedar Coffee Table; Piano and stool; and One White Four-drawer antique Chest decreed to be the separate property of Plaintiff.

It is further decreed and ordered by the Court that defendant to pay within 60 days from this date, November 26, 1974, to the Clerk of this Court, a reasonable Attorneys fees for Plaintiff's Attorneys, Stamper & Otis, which the Court finds to be the sum of $350.00, and all Court costs accrued and accruing.

It is further ordered, adjudged and decreed by the Court that Plaintiff and defendant are to execute, within

thirty days from this date, Deeds, transfers of title, etc., as necessary to effect change of title as decreed herein by the Court, and in the event either party fails to comply with the Order of the Court in effecting such transfers of title, said Judgment herein to serve as a transfer of said property.

It is further ordered, adjudged and decreed by the Court that exceptions be allowed to both parties.

Dated this 26th day of November, 1974.

(s) Lavern Fishel

LAVERN FISHEL
District Judge

OKAY as to form:

STAMPER & OTIS

By (s) Jerry Otis

Attorneys for Plaintiff

MOORE & SHANAHAN

By (s) Bill Moore

Attorneys for Defendant

FILED
IN DISTRICT COURT
1974 DEC 13 PM 3:02
ATOKA COUNTY, OKLA.
JOY SURRELL, COURT CLERK
By (s) *Barbara Goff*
DEPUTY

APPENDIX C

FILED
SUPREME COURT
STATE OF OKLAHOMA
APR 27 1976
ROSS N. LILLARD, JR.
CLERK

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Tuesday, April 27, 1976

THE CLERK IS DIRECTED TO ISSUE
THE FOLLOWING ORDERS:

* * * * * * *

48,058 Linda Smith v. Carl C. Smith.
Rehearing denied

* * * * * * *

(s) *Ben T. Williams*
Chief Justice

APPENDIX D

FILED
SUPREME COURT
STATE OF OKLAHOMA
JUL 21 1976
ROSS N. LILLARD, JR.
CLERK

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

LINDA SMITH, APPELLEE,

vs. NO. 48058

CARL C. SMITH, APPELLANT.

NOTICE OF INTENT TO APPEAL

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES:

Notice is hereby given that Carl C. Smith, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Oklahoma reversing and remanding the instant case entered in this action on the 27th day of April, 1976, when the Supreme Court of the State of Oklahoma denied the Petition for Rehearing of the Appellant herein, the decision in the instant case was written on the 9th day of March, 1976. This appeal is taken pursuant to 28 U. S. C. § 1257(2).

(s) Warren Gotcher
WARREN GOTCHER

ATTORNEY FOR APPELLANT, CARL C. SMITH

POST OFFICE BOX T
McALESTER, OKLAHOMA 74501

CERTIFICATE OF SERVICE

I, Warren Gotcher, hereby certify that on the 21st day of July, 1976, I mailed a true and correct copy of the above and foregoing Notice of Intent to Appeal to Mr. G. Wendell Cathey, First National Bank Building, Durant, Oklahoma 74701, attorney of record for Appellee herein.

(s) Warren Gotcher

PROOF OF SERVICE

I, Warren Gotcher, the attorney for Carl C. Smith, Appellant herein, and having on file his Petition for Admission to the Bar of the United States Supreme Court, hereby certify that on the ..... day of July, 1976, I served three copies of the foregoing Jurisdictional Statement to the Supreme Court of the United States on the party, Appellee, Linda Smith, as follows: On Linda Smith, Appellee, by mailing three copies of the Jurisdictional Statement in a duly addressed envelope with postage prepaid to Mr. G. Wendell Cathey, First National Bank Building, Durant, Oklahoma 74701.

It is further certified that all parties to be served have been served.

.....

WARREN GOTCHER

Attorney for Carl C. Smith, Appellant

Supreme Court, U. S.
FILED
AUG 23 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 197____

No. 76-107

CARL C. SMITH,
Appellant,

VERSUS

LINDA SMITH,

Appellee.

On Appeal From The Supreme Court of Oklahoma

MOTION TO DISMISS

G. WENDELL CATHEY
FIRST NATIONAL BANK BUILDING
DURANT, OKLAHOMA 74701
Attorney for Appellee

August, 1976

In the
Supreme Court of the United States
October Term, 197——

No. 76-107

CARL C. SMITH,
Appellant,

VERSUS

LINDA SMITH,

Appellee.

On Appeal From the Supreme Court of Oklahoma

MOTION TO DISMISS

Pursuant to Rule 16 (1) of the Rules of the Supreme Court of the United States, Linda Smith the Appellee herein moves this Court to dismiss with cost the appeal taken to this Court by Carl C. Smith, Appellant, upon the following grounds.

1. The appeal does not present a substantial federal question.

2. The federal question sought to be reviewed was not expressly passed on.

3. The judgment rests on an adequate non-federal basis.

Dated August, 1976.

Respectfully submitted,

G. Wendell Cathey

G. Wendell Cathey
First National Bank
Building
P. O. Box 955
Durant, Oklahoma 74701

Attorney for Appellee

August, 1976

I, G. Wendell Cathey, the attorney for Linda Smith, Appellee herein, and having on file his Petition for Admission to the Bar of the United States Supreme Court, hereby certify that on the 19 day of August, 1976, I served three copies of the foregoing Motion to Dismiss to the Supreme Court of the United States on the party, Appellant Carl C. Smith, as follows: On Carl C. Smith, Appellant, by mailing three copies of the Motion to Dismiss in a duly addressed envelope with postage prepaid to Mr. Warren Gotcher of Gotcher, Gotcher and Gotcher, 325 East Parkway, McAlester, Oklahoma 74501.

It is further certified that all parties to be served have been served.

G. Wendell Cathey

G. WENDELL CATHEY

Attorney for Linda Smith,
Appellee.